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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:CORP:B06

PLR-147991-11

Date:

December 18, 2013

TY:

LEGEND:

Parent =

Purchaser =

Target =

Date1 =

Date2 =

Year1 =

Company Official1 =

Company Official2 =

Tax Professional =

Dear _____ :

This letter responds to a letter dated November 15, 2011, submitted on behalf of Parent, the common parent of a consolidated group ("Parent Group") and the U.S. shareholder of Purchaser, the foreign purchasing corporation, requesting an extension of time under § 301.9100-3 of the Procedure and Administration Regulations to file an election. Parent is requesting an extension to file a "§ 338 election" under § 338(g) of the Internal Revenue Code with respect to Purchaser's acquisition of the stock of Target on Date1 (sometimes hereinafter referred to as the "Election"). Additional information was received in subsequent letters. The material information is summarized below.

Purchaser was formed in Year1 by Parent. On Date1, Purchaser acquired all of the stock of Target, in what Parent represents qualified as a "qualified stock purchase" as defined in § 338(d)(3).

The Election was due on Date2 but for various reasons a valid Election was not filed. After the due date for the Election, it was discovered that the Election had not been filed. Subsequently, this request was submitted, under § 301.9100-3, for an extension of time to file the Election.

Section 338(a) permits certain stock purchases to be treated as asset acquisitions if: (1) the purchasing corporation makes or is treated as having made a "§ 338 election" or a "§ 338(h)(10) election"; and (2) the acquisition is a "qualified stock purchase".

Under § 301.9100-1(c), the Commissioner has discretion to grant a reasonable extension of time to make a regulatory election or a statutory election (but no more than six months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Sections 301.9100-1 through 301.9100-3 provide the standards the Commissioner uses to determine whether to grant an extension of time to make a regulatory election. Section 301.9100-1(a). Section 301.9100-2 provides automatic extensions of time for making certain elections. Requests for relief under § 301.9100-3 will be granted when the taxpayer provides evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government. Section 301.9100-3(a).

Section 301.9100-3(b)(1) provides, in general, that except as provided in § 301.9100-3(b)(3)(i) through (iii), a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer—

(i) Requests relief under this § 301.9100-3 before the failure to make the regulatory election is discovered by the Internal Revenue Service (IRS);

(ii) Failed to make the election because of intervening events beyond the taxpayer's control;

(iii) Failed to make the election because, after exercising reasonable diligence (taking into account the taxpayer's experience and the complexity of the return or issue), the taxpayer was unaware of the necessity for the election;

(iv) Reasonably relied on the written advice of the IRS; or

(v) Reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Section 301.9100-3(b)(3) provides that for purposes of § 301.9100-3(b), a taxpayer is deemed to have not acted reasonably and in good faith if the taxpayer—

(i) Seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 at the time the taxpayer requests relief (taking into account any qualified amended return filed within the meaning of § 1.6664-2(c)(3)) and the new position requires or permits a regulatory election for which relief is requested;

(ii) Was informed in all material respects of the required election and related tax consequences, but chose not to file the election; or

(iii) Uses hindsight in requesting relief. If specific facts have changed since the due date for making the election that make the election advantageous to a taxpayer, the IRS will not ordinarily grant relief. In such a case, the IRS will grant relief only when the taxpayer provides strong proof that the taxpayer's decision to seek relief did not involve hindsight.

Section 301.9100-3(c)(1) provides, in general, that the Commissioner will grant a reasonable extension of time to make a regulatory election only when the interests of the Government will not be prejudiced by the granting of relief. Generally, the interests of the Government are prejudiced if (i) granting relief would result in a taxpayer having a lower tax liability in the aggregate for all taxable years affected by the election than the taxpayer would have had if the election had been timely made (taking into account the time value of money) or (ii) if the taxable year in which the regulatory election should have been made or any taxable years that would have been affected by the election had it been timely made are closed by the period of limitations on assessment under § 6501(a) before the taxpayer's receipt of a ruling granting relief under this section. However, the IRS may condition a grant of relief on the taxpayer providing the IRS with a statement from an independent auditor (other than an auditor providing an affidavit pursuant to § 301.9100-3(e)(3) certifying that the interests of the Government are not prejudiced under the standards set forth in § 301.9100-3(c)(1)(i).

In this case, the time for filing the Election is fixed by the regulations (i.e., § 1.338-2(d)). Therefore, the Commissioner has discretionary authority under § 301.9100-3 to grant an extension of time for Parent to file the Election, provided that Parent acted reasonably and in good faith, the requirements of §§ 301.9100-1 and 301.9100-3 are satisfied, and granting relief will not prejudice the interests of the government.

Information, affidavits, and representations were submitted by Parent, Company Official1, Company Official2, and Tax Professional explaining the circumstances that resulted in the failure timely to file a valid Election. The information establishes that the taxable year in which the Election should have been made is closed by the period of limitations on assessment under § 6501(a). Ordinarily, the interests of the government are prejudiced in this circumstance. However, Parent has provided a statement as described in § 301.9100-3(c)(1)(ii) certifying that the interests of the government are not prejudiced under the standards set forth in § 301.9100-3(c)(1)(i).

Parent relied on a qualified tax professional employed by Parent, and the tax professional failed to make the election. Generally, if a taxpayer reasonably relied on a qualified tax professional who failed to make, or advise the taxpayer to make, an election, the taxpayer is deemed to have acted reasonably and in good faith.

However, pursuant to § 301.9100-3(b)(3), a taxpayer is deemed to have not acted reasonably and in good faith if it seeks to alter a return position for which an accuracy-related penalty has been or could be imposed under § 6662 at the time the taxpayer requests relief and the new position requires or permits a regulatory election for which relief is requested. At issue remains whether Parent is seeking to alter a return position by making the election for which relief is requested. The Field component of the IRS has provided that an accuracy-related penalty could be imposed on Parent Group in this case.

Parent Group's return for the year in which the election should have been made and for subsequent years contains inconsistencies in determining its return position. Only one of these items is consistent with a return position that a § 338(g) election was made, but even this one item is not necessarily indicative of a return position that an election was made. However, the remaining inconsistencies are indicative of a return position that no election was made.

Based on the facts and information submitted and the representations made, and based on the Field component's position, described above, we find that Parent is seeking to alter a return position within the meaning of § 301.9100-3(b)(3)(i) for which an accuracy-related penalty could be imposed. Accordingly, Parent is deemed to have not acted reasonably and in good faith. Section 301.9100-3(b)(3). Therefore, an extension of time is not granted for Parent to file the Election with respect to the acquisition of the stock of Target.

This ruling is based on the assumption that an accuracy-related penalty could be imposed on the taxpayer. We express no opinion concerning whether an accuracy-related penalty could be imposed.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling letter is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

Sincerely,

Ken Cohen

Ken Cohen
Senior Technician Reviewer, Branch 3
Office of Associate Chief Counsel (Corporate)

cc: